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Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of
The Telephone Consumer
Protection Act of 1991

CC Docket No. 92-90

AT&T COMMENTS

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SUMMARY

AT&T supports the Telephone Consumer Protection Acts ("TCPA's") prohibition of automated or prerecorded telephone solicitations to residential consumers. AT&T also acknowledges that many consumers prefer not to receive telephone solicitations by live operators and is committed to honoring such preferences. At the same time, many consumers wish to take advantage of the myriad of goods and services offered by companies through telemarketing (\$435 billion worth in 1990 alone) and to transact business through telemarketers. These competing interests appear to be best balanced by the Commission's proposal in the NPRM that telemarketers be required to establish and maintain business-specific do-not-call lists.

As shown in Part I of these Comments, business-specific do-not-call lists appear to offer a number of advantages over the proposal in the TCPA and the NPRM for a single, national database. Do-not-call lists preserve consumer choice by allowing consumers to decide which companies they wish to hear from and which they do not. Such lists also appear more cost-effective to establish and maintain, would permit changes more quickly and more economically, and would provide a greater degree of consumer privacy. The Commission's existing complaint procedures offer an effective enforcement mechanism, and

the Commission retains the option to consider establishing a "Compliance Board" composed of industry representatives and consumers to set minimum standards and adjudicate complaints.

Part II shows that the proposal for the establishment of a national do-not-call database also has merit but raises concerns that need to be addressed before such a database could provide a viable solution. A national database would accommodate the desires of those consumers who do not wish to receive any calls from any companies who market their goods and services through interstate telemarketing. In addition, a national database, if properly designed and maintained, could offer consumers a convenient and efficient way to restrict unwanted telephone solicitations. A national database, however, if not properly structured, could prevent consumers from obtaining telephone offers for goods or services from those companies with whom they may wish to deal. Such a database may also be expensive to establish and maintain and would need to be carefully designed so that it could process changes in a timely fashion and adequately protect consumers' privacy. These concerns need to be addressed satisfactorily before any national database is established.

Part III demonstrates that the NPRM's remaining three alternative proposals are deficient in several

respects. The proposal that network technologies could be used to screen out telephone solicitations is not now technically viable and is not likely to become so within a reasonable time. Similarly, the proposal for special directory markings raises significant logistical and operational problems, particularly for national telemarketers. Finally, absent a strong expression of consumer interest, there does not appear any need for more severe time-of-day restrictions than are typically used by responsible telemarketers today.

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AT&T COMMENTS

American Telephone and Telegraph Company ("AT&T") respectfully submits the following Comments in response to the Commission's Notice of Proposed Rule Making ("NPRM"), released April 17, 1992.

The Commission has issued its NPRM in response to the mandate of the Telephone Consumer Protection Act of 1991 ("TCPA"), which prohibits telemarketers' use of autodialers employing artificial or prerecorded messages to make unsolicited calls and restricts the operations of telemarketers who use autodialers or telephone facsimile machines in tandem with live operators.* The NPRM (§ 7)

* The TCPA prohibits the use of autodialers to call residential telephone lines to deliver a commercial message or to simultaneously engage two or more lines of a multi-line business (NPRM, § 2). In addition, the TCPA prohibits the use of any device to send an unsolicited advertisement to a fax machine (id., § 3). The TCPA also prohibits sending any facsimile message unless the machine marks, at either the top or bottom of each page, the date and time the message is sent and the identity of the sender, including the telephone number of the sending machine (id., § 5).

"proposes general implementing regulations, exemptions to the applicability of the statute's prohibited uses, and technical requirements applicable to autodialers and facsimile machines." As shown below, of the NPRM's five proposals to restrict live operator telephone solicitation to subscribers (§§ 27-33), the proposal to mandate that businesses establish and maintain business-specific do-not-call lists appears to best accommodate all competing interests, although a national database could also meet consumer needs if a number of concerns were first resolved.

INTRODUCTION

AT&T's interest in this proceeding derives from its ongoing participation in several types of national telemarketing activities. First, like many of its common carrier competitors, AT&T uses telemarketing to promote its long distance services directly to existing and potential customers. In addition, AT&T, through its wholly owned subsidiary American Transtech, acts as a telemarketing "service bureau," providing both local and national inbound and outbound telemarketing services on behalf of a wide variety of unaffiliated companies.

All of AT&T's telemarketing activities are conducted solely through live operators. This is significant in the context of this proceeding, because the central impetus for passing the TCPA was to ban

prerecorded telephone solicitations. The TCPA (Sec. 2) finds that "[e]vidence compiled by Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy." As Senator Hollings, who participated in the drafting of the TCPA, explained:

[C]ompanies that engage in [responsible] telemarketing do not oppose the restrictions contained in S.1462 as reported. These companies do not use automatic dialers or other equipment to make automated telephone calls and thus do not object to the reported bill. In addition, it is clear that automated telephone calls that deliver an artificial or prerecorded voice [commercial] message are more of a nuisance and a greater invasion of privacy than calls placed by 'live' persons.*

Thus, the greatest nuisance to consumers -- the use of artificial or prerecorded voices to deliver commercial messages -- has already been eliminated by the TCPA.** AT&T supports the TCPA's prohibition of such

* Senate Report No. 102-178, p. 1971, Legislative History to S.1462, the "Automated Telephone Consumer Protection Act," introduced July 11, 1991 (emphasis added). Accord, Communications Subcommittee Hearing on S.1410, S.1462, and S.857, Hearing Transcript, p. 22, July 24, 1991 (customers prefer live operators to computerized calls).

** AT&T agrees that the Congress did not intend to prohibit and the Commission should not prohibit using autodialers and recorded messages as voice messaging or informational service calls to existing customers: "Such informational calls do not offer a product or service to the called party and are an efficient method to communicate a message. . . ." (NPRM, §§ 10-11).

calls and acknowledges that many consumers prefer not to receive telemarketing calls even when live operators are used. AT&T is committed to honoring such preferences, and, in general, to protecting consumers' privacy rights.*

At the same time, as the TCPA also notes, telemarketing has increased dramatically within the past decade and is now a major industry in the United States. In AT&T's estimate, the telemarketing industry supports 3.4 million jobs nationwide. Over 30,000 businesses actively telemarket goods and services to business and residential consumers (TCPA, ¶ 2). Due in part to telemarketing's low cost relative to other forms of advertising, businesses make more than 300,000 telemarketing calls to more than 18 million Americans every day, with sales amounting to \$435 billion in 1990, a "more than four-fold increase since 1984" (*id.*, para. 3). These facts alone indicate that consumers choose voluntarily to spend substantial sums in response to telemarketing solicitations and that telemarketing successfully fulfills a desire by innumerable consumers

* AT&T also supports the Commission's proposed rules implementing the TCPA's requirements that facsimile equipment or other electronic equipment usable for the transmission of facsimile messages be manufactured with the ability to mark each page with certain information identifying the sender and that originators of the messages who employ such equipment in fact include such information on all of their transmissions (*id.*, ¶ 20). See TCPA, 47 U.S.C. § 227(d)(2).

both to obtain information about and to purchase the myriad products and services offered through telemarketing efforts.*

Telemarketing is also a cost-effective way for many entrepreneurs to start their own businesses and to compete.** Many consumers prefer goods and services offered through telemarketers because telemarketing allows companies to avoid the high overhead and advertising costs which traditional retail stores must bear and thus to lower the prices of their offerings. Furthermore, these goods are usually shipped directly to customers, which for many makes purchasing by telemarketing not only less expensive but also more convenient.

In short, telemarketing represents a substantial industry which provides numerous benefits to consumers.

* According to industry statistics, one out of every 14 people called by a telemarketer makes a purchase. "The Right of the Called," The Christian Science Monitor, June 10, 1988. A study conducted by Simmons Market Research Bureau in 1984 for the Direct Marketing Association notes that "51% of [recipients of telephone sales messages] listen to the complete message, 42% cut off the speaker sometimes, and only 7% hang up consistently." Fannin, Will New Laws Hang Up Telemarketers, Marketing & Media Decisions, pp. 47-48, May 1985.

** See, McCarroll, Thomas, Time, v.139, p. 62, January 6, 1992. "An estimated 1.3 million new businesses opened their doors in 1991, up nearly 9% from 1980, when 1.2 million start-ups were launched. More than half the new enterprises are sole proprietorships or micro businesses with no more spare room. . . ." Id.

It is therefore essential that any additional restrictions that the Commission may place on telemarketing activities, particularly those that use live operators, not only appropriately accommodate consumers' legitimate privacy interests, but also allow consumers to continue to receive information efficiently from the telemarketing industry regarding products and services that are of interest to them.

I. THE PROPOSAL THAT TELEMARKETING COMPANIES ESTABLISH AND MAINTAIN BUSINESS-SPECIFIC DO-NOT-CALL LISTS APPEARS TO BEST ACCOMMODATE ALL COMPETING INTERESTS.

The NPRM (§§ 27-33) seeks comment on five regulatory alternatives designed to "restrict live operator telephone solicitation to subscribers": (1) the establishment of a single national database containing telephone numbers of residential subscribers who do not wish to receive telephone solicitations; (2) utilization of network technologies that would allow callers to screen out telephone solicitations; (3) carriers' solicitation and subsequent identification, by a special marking in directory listings, of those customers who do not wish to receive telemarketing solicitations; (4) imposition of time-of-day restrictions on when telemarketers may call; and (5) a requirement that companies establish, operate, and maintain their own do-not-call lists.

Courts have expressed concern over the extent to which such regulatory alternatives prevent communicators from reaching willing recipients and, therefore, have sought to ensure that the least intrusive means are used to achieve the regulatory goals in question.* Congress acknowledged and sought to accommodate that same concern while drafting the TCPA.** The NPRM's proposal that telemarketing companies be required to maintain lists of consumers who do not wish to receive telemarketing calls is consistent with this objective of both the courts and Congress and appears to be the least intrusive method that "is designed to return a measure of control to both individual residential consumers and owners of facsimile machines."***

* See, e.g., Board of Educ. v. Pico, 457 U.S. 853, 866-67 (1982)(plurality opinion)(holding school board's removal of books from school library unconstitutional). See also, U.S. CONST. AMEND. I ("Congress shall make no law abridging the freedom of speech . . ."); accord, Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (invalidating a state ban on drug advertising, finding such advertising necessary to convey important commercial information); Optimist Club v. Riley, 563 F.2d 847, 849 (E.D.N.C. 1982) (enjoining amendment to North Carolina statute making it unlawful to solicit charitable contributions by telephone because less restrictive registration scheme existed).

** See, e.g., TCPA, Sen. Rept. 102-178, p. 1973.

*** Legislative History to H. 1304, the "Telephone Advertising Consumer Rights Act" introduced July 30, 1991, p. 5, Purpose and Summary ("the Committee does not attempt to make all unsolicited telemarketing or facsimile advertising illegal").

As the NPRM notes, "[s]ome companies have [already] been maintaining lists of customers or prospective customers who have expressed a desire not to be contacted" (id.). AT&T, for example, has established do-not-call lists specifically designed to protect consumers' privacy rights and expectations. Such lists are a natural outgrowth of a telemarketer's incentive "to avoid expending the time and investment in contacting subscribers who do not wish to be contacted" (id.).

The alternative of business-specific do-not-call lists would appear to offer numerous advantages over the proposal in the TCPA and the NPRM for a single, national database. First, do-not-call lists would preserve consumer choice. Consumers would be able to designate which companies they wish to hear from and which they do not. No other alternative offers this flexibility.

Second, such lists are cost-effective to establish and maintain because they would be limited to one company and would not have to bear the common administrative and overhead costs of a large, multi-party, national database. Moreover, each business would have the incentive and ability to design its do-not-call list in the most efficient way, using its existing data systems. This would lower costs, increase efficiencies, and, in particular, reduce burdens on smaller companies.

Third, additions to and deletions from do-not-call lists could be implemented quickly and

economically. Telemarketers would not have to go through a large "middleman," i.e., a national database containing millions of names and telephone numbers, in order to process an addition or deletion. Rather, the company would process its own much smaller set of requests itself pursuant to its own procedures, using the same equipment and software it uses for other purposes every day. This would significantly reduce delays and errors in processing such requests.

Fourth, business-specific do-not-call lists potentially provide greater protection of consumers' privacy. A consumer's identification information would not become part of a single database managed and accessible by many different parties but, rather, would be confined to and controlled by the telemarketing company itself, which has every incentive to protect the information carefully. This greatly reduces the risk of compromising consumers' privacy.

In order to inform consumers of their rights, the Commission could require telemarketers to notify their customers that they have the option to prohibit specific businesses from placing telemarketing calls to them. The notification could be accomplished through notices in directories, direct mail, or other customer communication.

Any concerns consumers may have regarding enforcement of the requirement of business-specific do-not-call lists can be effectively addressed through the

Commission's existing complaint mechanism. If the Commission finds it necessary, it could institute streamlined complaint procedures for claims arising under the TCPA. The Commission could also consider establishing some form of "Compliance Board" composed of representatives of the telemarketing industry, consumers, the Commission, and perhaps other interested parties. Such a Board could, among other things, set minimum standards regarding the establishment, maintenance, and use of business-specific do-not-call databases and could be used to adjudicate complaints received by the Commission of alleged violations of those standards.

II. THE PROPOSAL FOR THE ESTABLISHMENT OF A NATIONAL DATABASE HAS MERIT BUT RAISES CONCERNS THAT NEED TO BE ADDRESSED.

The NPRM (paras. 28-29) also seeks comment on the possible creation of a national database pursuant to the TCPA, which states that the Commission "may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase" (NPRM, para. 28).

There is merit to this proposal. AT&T recognizes that many consumers do not wish to receive any calls from any companies that market their goods or services through

telemarketers. A national database would accommodate these consumers. Moreover, depending on how it were established and managed, a national database could offer consumers a convenient and efficient mechanism for preventing unwanted and intrusive telemarketing solicitations.

A national database, however, also raises certain concerns that would need to be addressed. First, a national database that only offers a "no calls" designation could deny consumers the right to receive information from those telemarketers with whom they may wish to deal. Consumers who do not want to hear from certain companies' telemarketers would have to place their names in the national listing. From that point on, all telemarketers would be prohibited from placing any telephone calls to those consumers unless the telemarketer had an "established business relationship" with the consumer.* This would deny consumers the option to hear from telemarketers whom they may wish to patronize if given the opportunity. As a result, consumers would be denied alternative choices for goods and services that they might otherwise prefer for reasons of price, quality, convenience, or any other reason.

In short, an inflexible national database would prevent telemarketers from reaching willing recipients and

* See TCPA, § 3(a)(3).

thereby would restrict consumer choice. However, it would be both possible and desirable to address this concern by designing the database to permit consumers to designate which particular companies they do not wish to hear from. Although this would increase the complexity and cost of the database, it would give consumers a degree of added flexibility and choice which they would not otherwise have under the current proposal.

Second, the database could be expensive. The statute mandates that consumers not be charged for participation in the database, and the Commission in the NPRM (§ 29) tentatively finds that "any database would not be a government-sponsored institution and would not receive federal funds or a federal contract for its establishment, operation, or reimbursement." The costs of the database, therefore, would have to be paid by companies using telemarketing initially and ultimately by consumers in the form of higher prices for goods and services. AT&T estimates that establishing a national database capable simply of tracking company-specific designations would cost approximately \$24 million. The cost could rise to as much as \$80 million, depending on the type and sophistication of the customer notification and confirmation systems employed.*

* See Exhibit A. These figures do not include each individual telemarketing company's cost of processing its customers' do-not-call requests through the database.

Third, a national database runs the risk of not satisfying consumers' expectations regarding efficient implementation of requests not to be called. Establishing and maintaining such a database would be very significant undertaking. The database likely would contain millions of names and telephone numbers, at least 20 percent of which would change every year as people move, change telephone numbers, disconnect service, or simply decide to enter or leave the database. As a result, the database would have to be designed and maintained in such a way that consumers' requests for addition or deletion from the national listing would be honored in a timely fashion. The Commission notes (NPRM, ¶ 28) that a database could probably only be practically updated quarterly or semi-annually. Unless this were changed, consumers signing up for the database might continue to be called for 3 to 6 months before actually being entered onto the system (id.). Such a significant time lag undoubtedly would cause annoyance and dissatisfaction.*

Further, a national database raises concerns regarding the protection of consumers' privacy. The

* In addition, even after being entered in the database, consumers would likely continue to receive all calls from those entities that are exempted from the TCPA, including charitable institutions, state and local governments, election campaigns, and pollsters. This undoubtedly would be contrary to the expectations of many consumers that placing their names in the national database would insulate them from all telemarketing calls.

database itself would be a highly valuable commercial asset, because it would contain in a single location the identities of millions of consumers. Special security precautions and procedures would therefore have to be implemented to prevent unauthorized access to the system.

In sum, the proposal for a national database has merit, but it raises important issues regarding consumer choice, cost, efficiency, and privacy which would need to be resolved before actual implementation.

III. THE NPRM'S OTHER THREE PROPOSED ALTERNATIVES TO RESTRICT TELEPHONE SOLICITATION ARE DEFICIENT IN NUMEROUS RESPECTS.

The other three alternatives suggested in the NPRM to restrict live operator telephone solicitation do not appropriately balance the competing interests of consumers' right to privacy and their concomitant right to engage in commercial transactions with companies of their choosing. As shown below, these alternative proposals unduly restrict consumer choice or, in some instances, cannot feasibly be implemented.

A. Network Technologies

The NPRM (§ 30) suggests that perhaps network technologies could be used to allow callers to screen out telephone solicitation. All telemarketers, for example, would be assigned the same telephone prefix for their calls, which called parties could then block.

Such technology, however, depends on the implementation of SS7 network interconnect, which is not likely to be available for several years. As the NPRM correctly notes (§ 30), such blocking technology is particularly problematic for interstate calls that are preceded by an area code where "the called party would have to be served by a central office equipped with the capability to recognize and block the special prefix". SS7 network interconnect has not progressed to the point that technologies such as Caller ID may be effectively used to screen interstate calls, and other SS7-based services, like Call Block, would require additional deployment in both the local exchange and interexchange carrier networks before it could become a viable solution to telemarketing concerns. Moreover, this alternative, like the national database, would deny consumers access to all telemarketers, even those they may wish to hear from. In short, this alternative is not technically viable at this time and is overly restrictive.*

* AT&T, however, supports the Commission's proposed rules requiring that artificial or pre-recorded voice systems automatically release the called party's line within five seconds of an on-hook signal from the called line (id., § 21). Such rules are consistent with the TCPA's intent that the called party's line be released so that dial tone can be re-established thereafter, in accordance with existing network parameters. See H.R. 1304, Legislative History, p. 40.

B. Special Directory Markings

Another alternative suggested by the NPRM (§ 31) is special directory markings. Under this proposal, carriers would be requested "to collect information from subscribers regarding whether they wish not to receive telephone solicitations." Subscribers who do not wish to receive telemarketing calls would be identified by a special mark in their directory listing, and telemarketers would be required to screen their marketing lists against those directory markings.

The NPRM (id.) notes that "[i]t is not clear how such a system would be applied to national telemarketers," and indeed that is precisely the problem. There is no national directory listing which is centrally compiled and maintained; rather, directories are separately developed and managed by local exchange carriers ("LECs") and numerous non-telecommunications companies on a regional basis. Thus, there are hundreds of independently managed directory databases scattered throughout the country which telemarketers would have to access in order to screen their own customer lists. This obviously raises significant logistical and security problems for both telemarketers and the owners of the databases which would take substantial time and money to overcome.*

* In addition, national directory listings would not include consumers with unlisted numbers.

Moreover, the NPRM (§ 31) proposes that the onus to collect the information from subscribers would be on carriers -- even though many carriers are not telemarketers and many telemarketers are not carriers. This clearly increases the complexity, delay, and cost of both identifying consumers who do not wish to receive telemarketing calls and adding and deleting the special markings from the directory listings in an efficient manner. As with the national data base option, there would be a significant lag between a customer's request for a special directory marking and the implementation of the request, because directory listings usually are updated only once a year. Further, as with the national database, consumers would only be able to screen out all telemarketing calls, including those from telemarketers they may in fact wish to deal with. Although the directory marking alternative may provide local telemarketers with cost-effective "do-not-call" information, it does not appear practical for telemarketers who operate nationally.

C. Time-of-Day Restrictions

The NPRM (§ 33) seeks comment on time-of-day restrictions. Specifically, the NPRM (id.) notes that "time-of-day restrictions place minimal constraints on telemarketers who indicate voluntary compliance with [a 9:00 a.m. to 9:00 p.m. restriction] as a matter of good business etiquette."

AT&T agrees. As the NPRM notes (id.)

"[a]dvertisers have no particular incentive to contact consumers at extremely odd hours." Indeed, responsible telemarketers have every incentive to do just the opposite; they try to solicit their customers in a manner that is the least disruptive possible, in order to increase the chances of a sale and to maintain good business relationships.* In the absence of a strong expression of consumer interest in specific and more severe time-of-day restrictions than are typically used by responsible telemarketers today, action by the Commission is not warranted.

* For this very reason, AT&T voluntarily restricts its telemarketing activities to the 9:00 a.m. to 9:00 p.m. time period.

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IV. CONCLUSION

For the reasons stated herein, the proposal that telemarketing companies be required to establish, operate, and maintain business-specific do-not-call lists appears to best accommodate all competing interests.

Respectfully submitted,

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Dated: May 26, 1992

National "Do Not Call" Database

Database Assumptions* Indicates Option Used

Database System	* Mainframe
Database Field(s)	* Telephone Number
	* Name
	* Address
	* Date Entered
	* Optional fields
Publicity	None
	* LEC Bill Insert <i>Years 1 and 2</i>
	LEC Bill Message
	* Media Advertising <i>One Quarter Only in Year 1</i>
Subscriber Registration	* Mail-In
	800 Call-In/Service Rep Processes
	Fully Automated
Subscriber Confirmation	None
	* Postcard
Number Change Updates	* Service Bureau Processing
	Time Limit Expiration
Subscriber Registration	8,000,000
Annual Additions	10%
Annual Changes	20%
Cost Summary	Year 1 Year 2
Computer System and Software	\$840,253 \$722,158
Publicity	\$9,335,750 \$5,328,000
Subscriber Registration	\$5,800,000 \$1,880,000
Subscriber Confirmation	\$8,000,000 \$2,400,000
Number Change Update	\$80,000 \$176,000
Total Costs	\$24,056,003 \$10,506,158